

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 6**

AREA WIDE PROTECTIVE (AWP)

Employer

and

Case 06-RC-252844

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL UNION 978**

Petitioner

DECISION AND DIRECTION OF SECOND ELECTION

On December 4, 2019, International Brotherhood of Electrical Workers Local Union 978 filed the instant petition seeking to represent protectors, senior protectors, and lead protectors (also known as flaggers and safety control specialists) employed by the Employer and reporting to Area Wide Protective (AWP) 132- Parkersburg, WV and Area Wide Protective (AWP) 133- Huntington, WV; but excluding all clerical employees, confidential employees, and guards, and supervisors and professional employees as defined in the Act, and all other employees.

On December 16, 2019, I approved a Stipulated Election Agreement scheduling a manual election for January 2 and 3, 2020.

After the election the Petitioner filed timely objections to conduct affecting the results of the election. On January 20, 2020, Region Six placed the processing of the objections in abeyance pending the outcome of related unfair labor practice cases 06-CA-252223, 06-CA-253068, 06-CA-253078, which were concurrently pending investigation in Region Nine.

On October 9, 2020, the Regional Director, Region Nine issued an Order Approving Conditional Withdrawal of Case 06-CA-253068 and Severing Cases, and approved a Settlement Agreement resolving the allegations in Cases 06-CA-252223 and 06-CA-253078.

On October 9, 2020, the Regional Director, Region Nine, also approved a Stipulation and Agreement to Set Aside Election wherein the Petitioner and Employer agreed that the first election be set aside and that a rerun election be conducted at a date and time to be determined by the undersigned. The parties further agreed that the Employer would be provided with the opportunity to present its argument in support of its preference that a manual election be conducted.

The Employer having now fulfilled all of the compliance requirements of the Settlement Agreement, and the parties having been provided an opportunity to present their respective positions regarding the appropriateness of conducting a manual election or mail ballot election, I issue this Decision and Direction of Second Election finding that mail ballot election will be conducted in this matter.

I. POSITION OF THE PARTIES

The only matter in contention is whether to conduct a manual election or mail ballot election. The determination of the method of the election is within the sole discretion of the Regional Director and generally, it is not an issue subject to litigation. See NLRB Casehandling Manual (Part Two), Representation Proceedings, Section 11228 and Section 11301.2. However, I am mindful that my decision regarding the election arrangements is subject to review by the Board. For that reason, and pursuant to the Stipulation and Agreement to Set Aside Election, the parties' positions concerning the election arrangements have been solicited and carefully considered.

The parties are not in agreement concerning the type of election that is appropriate in the instant situation. The Union has taken the position that a mail ballot election should be conducted. The Employer has taken the position that a manual election should be conducted in the present circumstances, and that it can be conducted safely.

The Petitioner asserts in its position statement that a mail ballot election should be conducted due to scattered residences of the employees in the petitioned-for bargaining unit and due to the safety concerns presented by the ongoing COVID-19 global pandemic.

The Employer asserts that a manual election is appropriate under the current circumstances and can be safely conducted. In its position statement the Employer details extensive safety precautions it is willing to take, including the use of personal protective equipment, barriers between individuals, markings and directional signs to help maintain social distances, the submission of all health and safety certification as detailed in GC 20-10, and the location of the polling areas in heated tents set up in parking lots, including proposing to use a hotel parking lot for the Huntington location. The Employer does acknowledge that the current COVID-19 testing positivity rate in the state of West Virginia is about 11%, but argues on this point; 1) that positivity rates are not necessarily a reliable criteria to determine infection rates and; 2) that the infection rate of the Employer's own employees is a more reliable marker of the severity of the outbreak in the relevant area.

The Employer correctly notes the Board's historical strong preference for manual elections, and that the Board, in its recent decision in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), did not mandate that a mail ballot election must be conducted if one or more of the factors set forth in *Aspirus Keweenaw* are present. Rather, the Employer argues that the Board provided the Regional Directors with factors that should be present before the Regional Director "can consider" directing a mail ballot election. The Employer's position statement then enumerates the six *Aspirus Keweenaw* factors and demonstrates that only one of those factors is present in this case, the testing positivity rate (based upon the cited statewide rate of 11%).

Finally, the Employer also notes in its position statement that the initial election in this case was conducted manually and, "Thus, the Region has already determined that a manual election—not a mail-in ballot election — is the best way to achieve a fair election in this case."

II. FACTS

The Employer provides traffic control and safety services at various work sites. The employees generally report directly to their work sites and do not regularly report to a centralized facility.

The manual election conducted on January 2 and 3, 2020, was conducted at two locations. The January 2, 2020 polling sessions were conducted at a hotel on Kinetic Drive in Huntington, West Virginia. Huntington is located in Cabell and Wayne Counties in West Virginia. The January 3, 2020, polling sessions were conducted at the Employer's offices at 1537 Elizabeth Pike, Mineral Wells, WV, which is located in Wood County, West Virginia. The polling sessions were scheduled to coincide with regularly scheduled mandatory safety meetings because the affected employees do not regularly report to centralized locations. Further, the Huntington polling sessions were conducted at a hotel because the Employer does not maintain an office or facility in that area.

As noted by the Petitioner in its position statement, and as reflected on the Voter Lists from the first election, the employees in the petitioned-for bargaining unit reside in various cities in West Virginia, Ohio and Kentucky.

As noted above, Mineral Springs, West Virginia is located in Wood County and Huntington, West Virginia is located in Cabell and Wayne Counties in West Virginia. As of January 22, 2021, the testing positivity rate in Wood County is 10.49%. In Cabell County the testing positivity rate is 7.71% and in Wayne County the testing positivity rate is currently 9.06%. The positivity rate in all three counties has remained above 5% since November.¹

III. BOARD LAW

On November 9, the Board issued its Decision on Review in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), wherein it “set forth more specific and defined parameters under which Regional Directors should exercise their discretion in determining election type against the backdrop of Covid-19.” *Aspirus Keweenaw*, 370 NLRB No. 45 slip op. at 4. Moving forward, the Board has identified the following six situations which suggest the propriety of using mail ballots to conduct elections:

(1) [t]he Agency office tasked with conducting the election is operating under ‘mandatory telework’ status...(2) [e]ither the 14-day trend in the numbers of new confirmed cases of Covid-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher...(3) [t]he proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size...(4) [t]he employer fails or refuses to commit to abide by the GC Memo 20-10 protocols...(5) [t]here is a current Covid-19 outbreak at the facility or the employer refuses to disclose and certify its current status...(6) [o]ther similarly compelling considerations.

¹ <https://covid.cdc.gov/covid-data-tracker>

Aspirus Keweenaw, 370 NLRB No. 45 slip op. at 4-8. “County-level positivity rate data should be obtained from official state or local government sources.” Id. at 6, fn. 25. If “some or all of the work force comes from areas outside the county, it may be appropriate to consider data from those other areas.” Id. at 6.

IV. APPLICATION OF BOARD LAW TO THE FACTS

Due to the significantly high testing positivity rates in Wood, Cabell, and Wayne counties in West Virginia, I find that a mail ballot election is warranted.

In its position statement the Employer correctly noted the Board’s preference for manual elections, which the Board specifically recently reiterated in *Aspirus Keweenaw*, 370 NLRB No. 45 slip op. at 2. Further, I note that in *San Diego Gas & Electric*, 325 NLRB 1143 (1998) the Board has set forth three specific circumstances in which Regional Director’s may exercise discretion to direct a mail ballot election:

“(1) where eligible voters are “scattered” because of their job duties over a wide geographic area; (2) where eligible voters are “scattered” in the sense that their work schedules vary significantly, so that they are not present at a common location at common times; and (3) where there is a strike, a lock-out, or picketing in progress. “ *supra* at 1145.

While *San Diego Gas & Electric* makes clear that a Regional Director’s discretion to determine election arrangements is not unfettered, “extraordinary circumstances” may justify a departure from the specific circumstances enumerated in *San Diego Gas*. To this end, in *Aspirus Keweenaw* the Board specifically cited its own April 17 public announcement regarding the current “extraordinary circumstances” related to the pandemic in which it stated:

Consistent with their traditional authority, Regional Directors have discretion as to when, where, and if an election can be conducted, in accordance with existing NLRB precedent. In doing so, Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state and local laws and guidance.²

The Board then listed the six parameters, cited above, that Regional Directors should evaluate in determining the appropriateness of directing a mail ballot election in light of the ongoing extraordinary circumstances of the pandemic. The Board went on to state that “If one or more of these situations is present, that will normally suggest the propriety of using mail ballots under the extraordinary circumstances presented by this pandemic.” *Aspirus Keweenaw*, 370 NLRB No. 45 slip op. at 4.

One metric cited by the Board that suggests the propriety of using mail ballots to conduct an election during this pandemic is a 14-day testing positivity rate above 5 percent in the county where the manual election would be held. As noted above, the positivity rates in Wood, Cabell

² <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>.

and Wayne Counties have been higher than 5 percent since November. While the Employer argues that the low positivity rate among its own employees is a more reliable indicator than any geographic positivity rate, and the Board did include as one of its factors whether the Employer's own employees are experiencing an outbreak, the Board did not give increased weight to any particular factor and specifically found that only one factor need be present in order to "normally suggest the propriety of using mail ballots under the extraordinary circumstances presented by this pandemic." *Aspirus Keweenaw*, 370 NLRB No. 45 slip op. at 4.

Finally, I note that the Employer specifically contended in its position statement that "the Region has already determined that a manual election—not a mail-in ballot election — is the best way to achieve a fair election in this case." The first election was conducted pursuant to a Stipulated Election Agreement entered into by the parties and approved by the undersigned. While the approval of this agreement indicates that the Region did not find a manual election to be inappropriate in the circumstances present at that time, no determination was made that a manual election was the "best way to achieve a fair election in this case." Further, as cited above, pursuant to *San Diego Gas & Electric*, 325 NLRB 1143 (1998), even absent extraordinary circumstances, Regional Directors are acting within their appropriate discretion to direct mail ballot elections"

"(1) where eligible voters are "scattered" because of their job duties over a wide geographic area; (2) where eligible voters are "scattered" in the sense that their work schedules vary significantly, so that they are not present at a common location at common times; and (3) where there is a strike, a lock-out, or picketing in progress. " supra at 1145.

Two of these *San Diego Gas & Electric* factors are present in the instant case and the direction of a mail ballot election would not necessarily be inappropriate in the instant case even absent the extraordinary circumstances presented by the COVID-19 pandemic.

Accordingly, considering all of above, and based on the most recent data demonstrating that the COVID-19 testing positivity rate has remained above 5% for an extended period of time in each of the relevant counties, I find that a mail ballot election is warranted in this case.

V. NOTICE OF ELECTION

The Employer also included in its position statement a request that so-called *Lufkin* language not be included in the instant Notice of Election. The Board in *Lufkin Rule Co.*, 147 NLRB 341 (1964) found that in the case of rerun elections being held after the filing of objections, certain language may be included in the rerun Notice of Election explaining the reason that a second election is being conducted. The Employer argues that the inclusion of such language would not be appropriate here in that there was no finding of misconduct on the Employer's part. The Employer cites the NLRB Casehandling Manual, Part II §11452.3 which does provide that *Lufkin* language is discretionary and the Employer notes that this rerun election is "being conducted in accordance with the terms of a settlement agreement between AWP and the Board which was executed prior to any determination on the merits of the unfair labor practice allegations and which includes an express non-admission of wrongdoing clause."

Section 11452.3 of the NLRB Casehandling Manual, Part II also, however, specifically provides suggested alternative language for use in rerun elections being conducted by agreement of the parties where a determination has not been made on the merits of the objections. According, I have determined that the Notice of Election in this matter will contain the following language:

The election conducted on January 2 and 3, 2020 was set aside by mutual agreement of the parties based upon alleged objectionable conduct of the Employer that the Petitioner contends interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this Notice of Election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, from interference by any of the parties.

VI. FINDINGS AND CONCLUSIONS

Having carefully considered the record evidence and applying the applicable Board law to these circumstances, I find that a mail ballot election is required in this case given the continuing high testing positivity rates in Wood, Cabell and Wayne Counties.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the Board. Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows.

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.³
2. The Union is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
3. There is no contractual bar, or any other bar, to conducting an election in this matter.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

³ The parties stipulated in the Stipulated Election Agreement approved on December 16, 2019, that the Employer, Area Wide Protective (AWP), a Delaware corporation, is engaged in the business of providing traffic control and safety services. During the past 12 months, a representative period, the Employer, in conducting its business operations described above, performed services valued in excess of \$50,000 directly for commercial customers located outside the State of West Virginia.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All protectors, senior protectors, and lead protectors (also known as flaggers and safety control specialists) employed by the Employer and reporting to Area Wide Protective (AWP) 132- Parkersburg, WV and Area Wide Protective (AWP) 133- Huntington, WV; but excluding all clerical employees, confidential employees and guards, supervisors and professional employees as defined in the Act, and all other employees.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Brotherhood of Electrical Workers Local Union 978.

A. Election Details

I have determined that a mail ballot election will be held due to the fact that the COVID-19 testing positivity rate has remained above 5% for an extended period of time in each of the relevant geographic counties.

The ballots will be mailed to employees employed in the appropriate collective-bargaining unit. Specifically, at 5:00 P.M. on Monday, February 8, 2021, ballots will be mailed to voters from the National Labor Relations Board, Region 06, 1000 Liberty Ave Rm 904, Pittsburgh, PA 15222-4111. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Tuesday, February 16, 2021, should communicate immediately with the National Labor Relations Board by either calling the Region 06 Office at (412) 395-4400 or our national toll-free line at 1-844-762-NLRB (1-844-762-6572).

All ballots will be commingled and counted at the Region 06 Office on Wednesday, March 3, 2021, at 1:00 p.m. In order to be valid and counted, the returned ballots must be received in the Regional Office prior to the counting of the ballots.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **January 23, 2021**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic

strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by Wednesday, January 27, 2021. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Issued at Pittsburgh, Pennsylvania this 25th day of January 2021.

/s/ Nancy Wilson

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